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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-848

IGNACIO DeLEON MARTINEZ,
JESUS CHAVARRIA GARCIA,

Petitioners,

v.

UNITED STATES ATTORNEY GENERAL
WILLIAM FRENCH SMITH, ET AL
UNITED STATES OF AMERICA

Respondents.

PETITIONERS' SECOND SUPPLEMENTAL BRIEF INVITING ATTENTION TO THE 1/24/84 ORDER IN UNITED STATES V. CRAWFORD ENTERPRISES, INC., CR. NO. H-82-224 (S.D. TEX.) and THE 1/24/84 ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE 10th CIRCUIT IN RESPECT TO THE OPINION IN UNITED STATES V. KILPATRICK, 570 F. SUPP. 505 (D. COLO. 1983).

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TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Discussion	1
I. The *Crawford* Case Exclusionary Order	3
II. The Government's Double Standard Application of the *Briggs* Case Rule	5
III. Other Matters	6
Conclusion	7
Appendix	9

TABLE OF AUTHORITIES

PAGE

Krippendorf v. *Hyde*, 110 U.S. 276 (1884) 1

Molinaro v. *New Jersey*, 396 U.S. 365 (1970) 1, 7

Precision Instrument Mfg. Co. v. *Automatic Machine Co.*, 324 U.S. 806 (1945) 1

United States v. *Briggs*, 514 F.2d 794 (5th Cir. 1975) 2, 5, 6, 7

United States v. *Crawford Enterprises, Inc. et al.* CR. No. H-82-224 S.D. Tex) 1, 2, 3, 4

United States v. *Kilpatrick*, 570 F.Supp. 505 (D. Colo. 1983) *appeal docketed* (withdrawal or amendment of Memorandum Opinion) No. 83-2284 (10th Cir. 1983); (Jan. 3, 1984 temporary order delaying publication of Memorandum Opinion vacated on Jan. 24, 1984) 2, 3, 5, 6, 7

United States v. *International Harvester Co.*, 720 F.2d 419 (5th Cir. 1983) 6

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The issues presented by the two cases that are the subject of this supplemental brief relate to the Petitioners' third argument.

The Petitioners' third argument is that the Fifth Circuit's dismissal of the Petitioners' appeals under the rationale of *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970), violated the principles of the equitable and just disposition of issues mandated by *Krippendorf* v. *Hyde*, 110 U.S. 276 (1884) and *Precision Instrument Mfg. Co.* v. *Automatic Machine Co.*, 324 U.S. 806 (1945).

The Petitioners' appeals challenged the constitutionally impermissive description of the Petitioners in accusatory pleadings in criminal cases as unindicted/uncharged participants in a bribery scheme. The Petitioners' third argument raises the question whether the fair administration of justice contemplates allowing the United States as a transgressor to invoke a procedural rule to precipitate a dismissal of appeals challenging the Government's wrongdoings. If the issue is not addressed, the Government's constitutional violations will remain unredressed and unpunished.

The *Crawford* case[1] involves a January 24, 1984 exclusionary evidentiary order (Appendix p. 9). The order was sought by and granted to the defendants in the *Crawford* case, which is one of the criminal cases in which the Petitioners were described but not indicted or charged as participants in the alleged Pemex bribery scandal.[2] The appeal in the *Kilpatrick* case[3] involves the double standard of constitutional protection utilized by the United States in cases that fall within the ambit of *United States* v. *Briggs*, 514 F.2d 794 (5th Cir. 1975), i.e., it is wrong for the

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[1] *United States* v. *Crawford Enterprises, Inc. et al*, CR-No. H-82-224 (S.D. Tex.).

[2] Paragraph 25 of Count One of the 10/22/82 indictment in the *Crawford* case states:

> "25. It was further a part of the conspiracy that defendants CEI, CRAWFORD and HALL, assisted by Cemco, defendants EYSTER and SMITH for Ruston, defendants MCLEAN and URIARTE for Solar, and defendants GONZALEZ and GARCIA, would and did transmit and cause to be transmitted approximately $9,960,432.40 in bribe money to Grupo Delta and to defendant BELTRAN for payment to Chavarria and ." (Note: the blank space at the end of the quotation resulted from the clerk's expungement of 37 identifications of DeLeon from the Crawford indictment pursuant to Judge Cire's 10/27/82 order.)

[3] *United States* v. *Kilpatrick*, 570 F. Supp. 505 (D. Colo. 1983) *appeal docketed* (withdrawal or amendment of Memorandum Opinion) No. 83-2284 (10th Cir. 1983); (Jan. 3, 1984 temporary order delaying publication of Memorandum Opinion *vacated* on Jan. 24, 1984).

judge in the *Kilpatrick* case to issue a written opinion decrying the alleged professional misconduct of three Department of Justice Attorneys, but it is proper for the United States to describe individuals as unindicted participants in a bribery scheme.

I.

THE CRAWFORD CASE EXCLUSIONARY ORDER

Pursuant to the Exclusionary Motion[4] filed by the *Crawford* defendants, Judge Cire, on January 24, 1984 issued his order excluding evidence at the February 13, 1984 trial about alleged transfers of funds to Switzerland (Appendix p. 9). The Defendants in the *Crawford* case stated their position at page 10 of their brief in support of their Exclusionary Motion in the following words:

> "... After five years of investigation, and despite its use of a mass of grand jury material as bargaining chips, the government has struck bargains with the Swiss and Mexican governments that have not procured sufficient evidence to identify the sources of Grupo Delta funds or a shred of evidence which identifies the ultimate recipients of the funds in question. ..."

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[4] The *Crawford* Defendants' Motion to Exclude evidence of alleged transfers of funds to Switzerland was bottomed on three propositions:

1) The Government didn't have proof that $9,960,432.40, or any part thereof, had been paid to the petitioners or transferred to Swiss Bank accounts controlled by the Petitioners;

2) The Defendants had withheld obtaining letters rogatory in respect to alleged bank transfers in detrimental reliance upon the Government's representation that the Government had requested the funds transfer data and the Defendants' request for the same data would jeopardize the prompt production of the data.

3) The Government now proposed to offer incomplete and misleading evidence that postulated a transfer of funds to a Swiss bank account, when the source of such funds could not be traced to Crawford Enterprises, Inc., and the identity of the ultimate depository of the alleged transferred funds was unknown.

The January 24, 1984 order confirms the Petitioners' contention that the United States had no proof[5] on October 22, 1982 (indictment date), or at later dates or finally on January 12,

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[5] Admissions by the United States in respect to its lack of proof of bribe payments to the Petitioners:

a) Paragraph 2 of the United States' 2/11/83 response to Defendants' bill of particulars in the *Crawford* case states:

> "2. The United States does not know the exact portion of each payment to Grupo Delta destined for Pemex officials, but can state the following:
>
> a. Between January, 1978 and the end of February, 1980, Grupo Delta received approximately $18,982,470.05 from CEI pursuant to various Pemex jobs, including not only those charged in the Indictment but also Jobs #163, 164, 165 and 213. Of this amount, $11,803,938 was payable to the "folks"
>
> b. The "folks" were defined by Crawford to Grupo Delta as including Ignacio DeLeon and Jesus Chavarria."

b) U.S. Trial Attorney Nicastro's comments in the 5/23/83 Hearing on Motions in the *Crawford* case Vol. 1, p. 156 were:

"Your honor, also we anticipate and we have some documents that we have acquired recently that we have not yet turned over that we will be able to offer proof of payment with respect to a certain amount of money going directly into an account controlled by one of the two Pemex officials listed in the indictment."

c) U.S. Trial Attorney Pendergast's statements in his December 21, 1983 affidavit in support of the 12/27/83 Motion by the United States for leave to take foreign deposition were:

> "b. Between January, 1978 and May, 1980 at least eighteen million dollars was forwarded via Crawford Enterprises, Inc. checks to Grupo Delta with at least ten million dollars of that money being earmarked as being for Chavarria and DeLeon. Through the cooperation of the Mexican Government, this money has been traced through numerous Mexican and United States bank accounts. Over five million dollars of this money has been traced to the Swiss Volksbank and to the Union Bank of Switzerland in Zurich, Switzerland."
>
> • • •
>
> "d. It is the Government's believe [sic] that these Swiss records will show that ownership of these bank accounts is in either the name of, or under the control of, Chavarria and DeLeon. This will complete the link of tracing funds between

1984 (motion date), that $9,960,432.40 in bribes had been paid to the Petitioners.

II.
THE GOVERNMENT'S DOUBLE STANDARD APPLICATION OF THE BRIGGS CASE RULE

Commencing on October 13, 1982 in informal discussions with Department of Justice lawyers, and at all times thereafter, the Petitioners have contended that it was and is improper for the United States to describe the Petitioners as un-indicted/uncharged participants in a bribery scheme. At the trial court level the Government resisted Petitioners' contentions on procedural and specious substantive grounds; at the appeals level the Government conceived and orchestrated or, at the very least, participated in an extradition strategem that enabled the *Briggs* rule to be by-passed.

On August 25, 1983 in the *Kilpatrick* case, the District Court issued a 20 page Memorandum Opinion granting a new trial to Mr. Kilpatrick. The opinion contained 17 pages of commentary about the professional conduct of three Department of Justice-Tax Division attorneys who had handled the Kilpatrick case.

The Government filed a motion to withdraw or amend the Memorandum Opinion on the grounds that because of a lack of a hearing on the merits the opinion posed a serious threat of unduly and irreparably injuring the professional reputations and careers of the three prosecutors. In the brief in support of their motion, the Government states that the Memorandum Opinion was violative of the rule of *United States* v. *Briggs*, 514 F.2d 794 (5th Cir. 1975). The District Court denied the Government's motion. The Government appealed the denial of the motion to the United States Court of Appeals for the Tenth Circuit and obtained a temporary order delaying the publication of the

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the defendants and the foreign officials whom they are accused of bribing."

Memorandum Opinion, which order was vacated by the Tenth Circuit on January 24, 1984 (Appendix p. 10-11).

The following points were made in the brief filed by the Government on 12/8/83:

> "Even an indictment, which is manifestly a document containing allegations rather than established facts, is recognized as a potentially damaging instrument. See, *e.g.*, *United States* v. *Briggs*, 514 F.2d 794 (5th Cir. 1975). By its nature as a document usually containing findings, an opinion by a court, even with caveats, has an even greater potential for harm."

Brief for Appellant at 16, *United Stated* v. *Kilpatrick*, No. 83-2284 (10th Cir. 1983).

> "It is plainly unfair to accuse individuals of wrongdoing where they have no forum to vindicate themselves. See *Briggs*, *supra*."

Brief at 19

> "In sum, without any need to do so, the District Court has effectively condemned professionals and potentially damaged their careers without a full hearing in which all of the evidence is presented. Such action is clearly inconsistent with notions of basic fairness."

Brief at 20

III.
OTHER MATTERS

The Court's attention is respectfully invited to the fact that George S. McLean, the appellant in *United States* v. *International Harvester Co.*, 720 F.2d 419 (5th Cir. 1983), has advised the Petitioners' attorney that he is preparing a Petition for Certiorari in respect to the adverse decision in the *Harvester* case, which opinion was the subject matter of the Petitioners' Supplemental Brief filed December 28, 1983. (Appendix p. 11)

CONCLUSION

The Petitioners' third argument deals with the constitutionally impermissive conduct of the United States and its representatives in guiding Houston Grand Jury 82-3 to the issuance of an indictment that violated the Petitioners' rights. Judge Cire's 1/24/84 order confirmed the Petitioners' factual contention that the indictment was constitutionally deficient and without basis for the contention that the Petitioners were the recipients of $9,960,340.40 in bribes.

The Government's withdrawal/amendment motion and brief in support thereof in the *Kilpatrick* case demonstrates the Government's adherence to a double standard of constitutional protection in *Briggs* type cases.

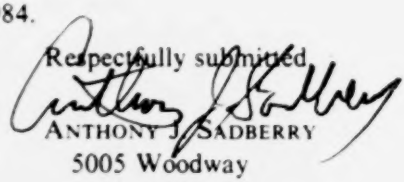
The United States Constitution, equity, and justice do not and cannot rest upon the proposition that the constitutional protection accorded United States attorneys can and should be of a higher degree than the constitutional protection accorded individuals who become enmeshed in a prosecutorial net woven and cast by the United States.

The Petitioners reiterate their contention that the dismissal of their appeals resulted from the incorrect application of the *Molinaro* rule. If the proper administration of the judicial process requires the classification of the Petitioners as fugitives from unperfected provisional extradition arrest warrants, an appropriate judicial remedy should be fashioned to let the record show the status of Petitioners both as fugitives from justice and

as individuals whose constitutional rights have been violated by the United States.

DATED January 30, 1984.

Respectfully submitted,



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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA

VS.

CRAWFORD ENTERPRISES, INC., ET AL.

Cr. No. H-82-224

ORDER

Following a hearing on January 18, 1984, and after considering the motions, the arguments of counsel, the record, and the law, the Court ORDERS:

1. Defendants Crawford Enterprises, Inc., Donald G. Crawford, and William E. Hall's *in limine* motion to exclude evidence relating to alleged transfer of funds to Switzerland is GRANTED. No evidence may be introduced concerning the transfer of funds to bank accounts in Switzerland.

2. The Government's motion for a continuance is DENIED.

3. Defendant Andres I. Garcia's motion to compel the production of the Government's response to his bill particulars is GRANTED. The Government shall produce its response by Tuesday, January 24, 1984, at 4:00 p.m.

SIGNED and ENTERED this 24th day of January, 1984.

GEORGE E. CIRE
UNITED STATES DISTRICT JUDGE

NOVEMBER TERM — JANUARY 24, 1984

Before Honorable William J. Holloway, Jr. and Honorable Stephanie K. Seymour, Circuit Judges, and Honorable Luther L. Bohanon, Senior Judge, United States District Court.*

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v. No. 83-2284
WILLIAM A. KILPATRICK,
Defendant-Appellee.

On consideration of the Brief for the United States filed December 8, 1983, in support of the merits of the Government's appeal, the Government's emergency motion filed December 29, 1983, the letter response of the Bank of Nova Scotia stating that it has no objection to an order delaying publication of the opinion in question until resolution of this appeal, and the remaining responses and objections to the delay of publication of the opinion, we conclude as follows:

Based on the authorities relied on by the Government including, among others, *Lucas* v. *Central Missouri Trust Co.*, 162 S.W.2d 569, 590-91 (Mo. 1942) (en banc); *Nadeau* v. *Texas Co.*, 69 P.2d 586, 596 (Mont. 1937); and *Lowenschuss* v. *West Publishing Co.*, 542 F.2d 180, 183 (3rd Cir. 1976), it is arguable that there is some distinction between a restraint on all dissemination of an opinion and a direction to a publishing company, as the reporter of a court's decisions, to delay publication of the opinion. We must nevertheless consider fully the force of opinions broadly banning prior restraints. *E.g.*, *New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *Near* v. *Minnesota*, 283 U.S. 697, 713-14 (1931). Considered in this light, we are

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* The Honorable Luther L. Bohanon of the United States District Courts for the Eastern, Northern and Western Districts of Oklahoma, sitting by designation.

not convinced that the Government has shown a justification for delay of publication of the opinion.

Accordingly the Government's emergency motion of December 29, 1983, is denied and the court's temporary order of January 3, 1984, is vacated.

HOWARD K. PHILLIPS
Clerk

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January 29, 1984

Mr. Charles J. Sullivan
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Subject: Deleon and Chavarria v. U.S. Att'y Gen'l, No. 83-848

Dear Charles,

I have reviewed your client's Petition for a Writ of Certiorari and the Supplemental Brief in the subject case.

There are many similarities in the government's misconduct and heavy handed administration of the judicial process in your clients case and the *Harvester* case wherein my Fifth and Sixth Amendment rights were violated.

I find unacceptable the Fifth Circuit's order affirming the District Court's order denying expungement. I further feel that the Fifth Circuit's opinion ... F.2d 927 is in error on several important points of law and that they simply ignored certain key facts concerning prosecutorial misconduct for some undisclosed reason.

I am in the process of preparing a Petition for a Writ of Certiorari which will be forwarded to the Supreme Court for docketing before February 27, 1984. (The Denials of my Petition for Rehearing and Suggestion for Rehearing En Banc were entered on December 29, 1983).

Thanks again for sending me a copy of your documents.

Best regards,

s/ GEORGE S. MCLEAN
George S. McLean